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The Relationship between Law and Morality

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ABSTRACT: This article deals with issues related to the historical process of the emergence of law, showing that law has gradually detached itself from religious prescriptions, moral norms, and customs. First of all, the legal concepts of law and morality were defined, specifying that law is perceived as an objective ethic that aims to assess the external facts of people in relation to other people, while morality is perceived as a subjective ethics whose object is the appreciation of the internal facts of consciousness of human intentions. Secondly, the particularities of law and morality were outlined, clearly emphasizing both the connection and the differences between them, and lastly, some conclusions necessary for the treatment of this topic were observed.

KEY WORDS: law, morality, legal order, moral order, custom

The Relationship between Law and Morality

During the primitive commune, there was no concept of law as a legal science, and the rule of legal norms appeared much later, by the gradual detachment from religious prescriptions, the rules of social coexistence and custom (custom of the place), necessary for human coexistence. In the absence of rules of social coexistence, chaos and anarchy would have been reached, so that the social order was restored through a system of social rules that emerged as an organic necessity of the primitive community. These morally normal social rules led to the maintenance of social order, the organization

of the activities of members of the primitive community, the procurement of food and necessities for common life, good order in the conduct of family life, but also the protection of their lands and defense against enemies from other cities, tribes or foreign people (Cernea & Molcuț 1996, 10).

Guy Durand, analyzing the subject of the relationship between law and morality, finds that law has evolved from evolutionary norms of morals and customs, so that in this sense, morality precedes law, serving as a proto-social legislation (Durand 1986, 285).

Momcilo Luburici claims that "the emergence of law is a historical necessity, a real social progress, because maintaining order could no longer be ensured with the system of rules in the gentile-tribal communities and it was necessary to establish other rules that sanctify social relations and ensure leadership of the society, the transformation of the social will into the will of the state, the obligatory general will" (Luburici 2005, 32).

It is important to note that Momcilo Luburici describes three essential phases of the formation of the law: (a) the adoption of habits (the custom being thus considered a source of law) which have lasted in ancient states and which have gradually been adapted to new social realities, being declared mandatory precisely because of its long, stable and perpetual practices, and in case of violation of these rules of social conduct, sanctions were provided from public disgrace, to the application of physical constraints; (2) the creation of written law and the establishment of normative acts that contained, in addition to old adapted customs, some new legal provisions, unknown to the primitive order, which established the rights and obligations of community members, the practice of religious cults, administrative-territorial organization, etc .; (3) the formation of law through the solutions given by magistrates and courts, this in a period of time far superior to the other phases of state organization (Luburici 2005, 32-33).

Definition of legal concepts of law and morality according to the law in force (de lege lata)

The law includes elements of an ideological, relational and institutional nature. The influence of politics on law takes place precisely through the activity of state institutions, as the state plays a key role in creating law and

legal consciousness, so that politics establishes the concrete forms and means of fulfilling legal norms and ensures their education in the spirit of respecting the laws and the legal order.

According to the law in force (de lege lata), the law is defined as: "the system of norms established or recognized by the state, in order to regulate social relations according to the state will, whose obligatory observance is guaranteed by the coercive (constraint) force of the state" (Luburici 2005, 40).

The Roman jurists, Celsius and Ulpianus, considered „fathers of law" defined law in the following spheres of understanding: (1) Celsius: „Law is the art of good and equity" („Jus est ars boni et aequi."); (2) Ulpianus: „these are the precepts of law: to live honestly, not to harm the other, to give to each his own, not to disturb the peace" („Juris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere, cuieta non novere") (Stan 2017, 16).

Ulpianus also defines law as „jurisprudentia est divinarum atque humanarum rerum notitia, justi quae injusti scientia" („jurisprudence is the knowledge of divine and human things, the science of what is just or unjust"), so Ulpianus defines law as a reality perceived only in the situation in which it is related to a religious reality represented by divine norms and as a science of human reality, represented by human norms, appreciating what is just from what is unjust (Stan 2017, 16).

Socrates (469-399 BC) defined law as „conformity to the will of the gods or conformity to good, for there is no difference between doing harm to one or doing an injustice to him, and injustice is in any case an evil - to do an injustice is to do evil, and not to do it is to do good" (Stan 2017, 17).

Morality traces to people the conduct they must follow, indicating also the sanctions inherent in the violation of moral norms by the social environment, whether it is public reproach and, implicitly, rebukes of conscience, remorse or shame, or about physical constraints. Thus, Momcilo Luburici defines morality as representing "a set of concepts and rules regarding good or evil, right or wrong, allowed or not allowed. Moral norms are the creation of society or social groups. The notions of good and evil with which the norms of morality operate are not given once and for all, but vary from one order to another, from one people to another" (Luburici 2005, 40).

Peculiarities of law and morality

In the course of time, the legal doctrine has shown that the delimitation of the sphere of law from the moral sphere is a rather controversial subject and difficult to treat, appreciating this as a central problem of the philosophy of law.

In general, in the assessment of the relationship between law and morality, the legal doctrine is pronounced in two main directions: (1) the one that conceived the law as a minimum of morality. It is argued that in the vertical of history, the evolution of law has been closely related to that of morality, so that law and morality are perceived as two facets of a phenomenon: morality is subjective ethics, while law is objective ethics. Mircea Djuvara argues that morality has as its object the appreciation of the internal facts of consciousness of human intentions, and the law has as its object the appreciation of the external facts of people in relation to others (Djuvara 1930, 101); (2) the one that supports the legal positivism, so that the fact that the law is an independent construction, detached from any other reality, except the state, is promoted. Specific to this point of view is the opinion according to which the appearance of law in social life is a spontaneous one, derived from the influence of social, political and ideological factors. They exclude any connection between law and morality, oppose legal ethics, and the science of law must disregard the influence of morality when analyzing the law because moral values are relative and no one can determine what is right or absolutely just (Kelsen 1962, 90).

Renowned French lawyer Georges Ripert appreciated that„there is no difference in scope, nature and purpose between the moral and the legal rule." The moral rule enters into law in an easy way, through the moral convictions of the legislator or magistrate, and, moreover, the above-mentioned author unequivocally indicates that aspects of moral obligations are inserted in the sphere of civil law: civil liability, the prohibition of unjust enrichment, the execution of contracts and the balance of benefits, the exercise in good faith of the rights conferred by law (Ripert 1935, 35).

Morality is thus perceived as a criterion for assessing the conformity of law with the idea of justice, so that positive law (all legal norms in force in a state) must comply with moral principles, otherwise its legal norms

would be qualified as unfair. It is important to note that positive law also contains legal norms to which ethical principles are indifferent, having only a purely instrumental role (eg traffic rules, economic rules and civil procedures or criminal procedural rules and many other legal rules, of a technical, organizational nature).

According to the moralist view of law, the moral and legal order are perceived as two concentric spheres, the larger sphere being the moral order and the other being the legal order, so that the legal order is an integral part of the moral order, it's not outside of it, it is within it, being organically linked to it, which is why the norms that govern the moral order cannot but have an influence on the legal order. The moral order is a state of equilibrium, achieved between the elements that are limited to the moral life (reason, freedom and moral conscience) (Rotaru 2014, 210-215) and it is governed by the guiding principles of good, truth and justice, and the legal order that the law creates could be defined as „a state of balance, achieved, maintained and governed by law, between external, free and conscious human facts and relationships, having a social character" (Stan 2010, 257). Therefore, we cannot qualify a legal norm as part of the science of law that confers legal order, if it contradicts moral values such as good, truth or justice, so that law cannot be independent of good, truth or justice, nor the legal order is not outside the moral order, but within it, and law appears as part of good, truth, and justice (Stan 2010, 254-256).

In the following, we will identify some similarities, but also distinct features between law and morality. First of all, we will observe the following similarities: (1) both in the moral order and in the legal order the conformity to the law takes place on the basis of the human conscience, of the beliefs of the people that what they do is right and good; (2) any legal qualification is based on a prior moral qualification, so that there is a relationship of dependence between the legal and the moral order; (3) the goal pursued in both law and morality is to establish order in the world, ensuring the protection of moral values such as good, truth or justice (Stan 2017, 116).

For a clearer understanding of the relationship between law and morality, it is necessary to delimit them by outlining the following differences: (1) morality norms are not, as a rule, written norms and are not necessarily included in certain official acts, while the law rules take an official form and

are the result of the official activity of state institutions, so that in the legal order there is a clear code stipulated by legal norms, while in the moral order this code is invisible, being the human conscience; (2) the sphere of morality is wider than the sphere of law, so that the moral order affects all human facts and relations, both internal and external, while the legal order deals only with external facts, of a social nature; (3) the observance of the norms of law, if necessary, is guaranteed by the coercive force of the state, while the observance of the moral norms, as a rule, is not guaranteed by the coercive force of the state, but by the pressure of social factors such as public shame, shame, blame, etc. Therefore, in the legal order, the sanction is imposed from the outside, while in the moral one, the sanction is imposed internally (Luburici 2005, 47).

In conclusion, we mention that the law regulates those social relations that aim at the good development of the relations in society according to the state will, whose obligatory observance is guaranteed by the coercive force of the state, and the morality aims at the totality of the conceptions and rules regarding good or evil, right or wrong, true or false, allowed or not allowed. Regarding the connection between law and morality, it was observed that two major points of view were drawn in the legal doctrine: (1) the moralistic conception of law, which maintains a deep connection between law and morality, law coming from the norms of morality and custom and (2) the positivist conception of law which argues that the influence of morality must be disregarded in the search for law. As for us, according to the point of view of the famous Romanian jurist Mircea Djuvara, we appreciate that legal norms must be validated by the moral principles of good, truth and fairness, morality precedes law, and law and morality must be perceived as two facets of a phenomenon, namely, morality is the subjective ethic that aims at the inner world of the human being with inner intentions, beliefs and thoughts, while law is the objective ethics that aims at the external actions of people in relation to their fellows.

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